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Jobs Americans Won't Do: Our Farming Heritage, Hazardous Harvests, and a Legislative Fix

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"Jobs Americans Won't Do": Our Farming Heritage, Hazardous Harvests, and a Legislative Fix

Matthew Webster†

Introduction

Juana and Miguel Lopez board up their house in Brownsville, Texas at the beginning of May every year, in case hurricanes should come before they return. Their children Deyanira and José take final exams a month early, then help their parents pack up the van for the fourteen-hundred-mile trip north to Minnesota. The Lopez family drives north, paying for gasoline with their tax refund checks and hoping floods, droughts, or mechanization won't steal their livelihood this year. They begin the season by hand-picking rocks from the fields, then weeding lettuce, then processing snap peas, then shucking corn. Every member of the family, from fourteen-year-old Deyanira to the seventy-eight-year-old grandmother Guadalupe, works on the farm, hoping that this year they will be paid in full, that this season they will leave Minnesota without an occupational injury, and that this summer they will breathe air free of pesticides while toiling under the northern sun.[1]

Immigration reform has been in the political eye for the past decade and most of the proposed legislation has included temporary guest worker programs.[2] The rationale behind such guest

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1. The story of the Lopez family was pieced together from the author's experiences as a teacher in Texas and as a migrant farmworker advocate with Southern Minnesota Regional Legal Services in and around Rochester, Minnesota in June 2009.

2. *See* ANDORRA BRUNO, CONG. RESEARCH SERV., RL 32044, IMMIGRATION: POLICY CONSIDERATIONS RELATED TO GUEST WORKER PROGRAMS 1 (2009) (describing the various guest worker programs proposed in the 109th, 110th, and 111th Congresses). Agricultural Job Opportunities, Benefits, and Security Act of

worker programs is often that temporary immigrants will perform "jobs Americans won't do,"[3] namely manual labor such as janitorial services and farmwork, and that nonimmigrant visas should be granted in order to fill these necessary occupations. While comprehensive immigration reform is necessary, few have looked deeper into the reasons *why* Americans refuse to perform agricultural labor, an industry uniquely protected throughout American history and long considered a bedrock of American industry.[4]

The reason Americans will not weed fields, pick vegetables, or shuck corn is not that these jobs are necessarily more physically demanding than other blue-collar occupations.[5] The real rationale is that, despite the United States' extensive worker protections in virtually every other industry, the domestic and immigrant farmworkers who harvest our nation's crops are woefully under-protected by the current mishmash of legislation.[6] Part I of this Article explores the American family farm and the farmworker legislation that sustains its cheap and reliable labor force, while Part II explains the persistent and ongoing hardships of our nation's farmworkers. Part III of this Article examines numerous statutes that fail to adequately protect farmworkers in the same way as laborers in other industries, including the Migrant and Seasonal Agricultural Worker Protection Act of 1983 (MSAWPA).[7] Part IV analyzes state and international alternatives to the current feeble federal farmworker protections, and Part V suggests ways Congress can amend MSAWPA in order to end unequal treatment of farmworkers.

2009, the latest incarnation of comprehensive immigration reform, has been referred to legislative committees. Agricultural Job Opportunities, Benefits, and Security Act of 2009, H.R. 2414, 111th Cong. (2009).

3. Jonathan Weisman, *Senate Republicans Agree on Immigration Bill: Wide Bipartisan Support Would Break Logjam*, WASH. POST, Apr. 6, 2006, at A19 (describing President George W. Bush's advocacy for "a bill that will include a guest-worker provision . . . [and] will recognize that there are people here working hard for jobs Americans won't do . . . .").

4. Agriculture's uniqueness is embodied in the Jeffersonian ideal of a confederacy of family farms; the Framers were, after all, farmers. *See* DON PAARLBERG, FARM AND FOOD POLICY: ISSUES OF THE 1980S 5 (1980) ("Farmers were considered uniquely worthy. . . . producing food, the most needed product of all. Farmers were considered good God-fearing citizens, stalwart defenders of the republic, and a stabilizing element in the society.").

5. *See infra* Part III.

6. *See infra* Part III.

7. Migrant and Seasonal Agricultural Worker Protection Act, Pub. L. No. 97-470, 96 Stat. 2583 (1983) (codified at 29 U.S.C. §§ 1801–72 (2006)).

I. Hired Hands: Domestic and Guest Workers in the Fields

A. *The Changing Faces of Farmworkers*

The United States is often dubbed a "nation of immigrants,"[8] but it is also, most decidedly, a country of internal migration. The United States has one of the highest mobility rates in the developed world.[9] Throughout the 1980s, between sixteen and twenty percent of the United States population changed residences each year.[10] Between 1995 and 2000, over 22 million people moved from one state to another.[11] While immigrant farmworkers are stereotypically associated with farm work and do indeed comprise a large portion of the American agricultural workforce, domestic migrants have been a cornerstone of American harvests for more than a century.[12]

African Americans had long labored as farmworkers in the South, but in the beginning of the twentieth century hundreds of thousands moved to northern cities, draining the southern fields of their longstanding workforce.[13] As the world wars diminished much of the U.S. working population, guest worker programs were established to maintain cheap labor for American farmers.[14] The first Mexican guest worker program began in 1917; in the program's first four years, 72,000 workers entered the United States.[15] After the war, authorized and unauthorized workers crossed the border, filling the void created by the restrictive 1924 Immigration Act, or National Origins Act, which essentially halted

8. *Immigration and the Labor Force*, 103 MONTHLY LAB. REV. 3, 3 (1980).

9. *See* U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-94-45, ELEMENTARY SCHOOL CHILDREN: MANY CHANGE SCHOOLS FREQUENTLY, HARMING THEIR EDUCATION 1 (1994), *available at* http://archive.gao.gov/t2pbat4/150724.pdf ("The United States has one of the highest mobility rates of all developed countries; annually, about one-fifth of all Americans move.").

10. DAVID KERBOW, CTR. FOR RESEARCH ON THE EDUC. OF STUDENTS PLACED AT RISK, PATTERNS OF URBAN STUDENT MOBILITY AND LOCAL SCHOOL REFORM 6 (1996).

11. RACHEL S. FRANKLIN, U.S. CENSUS BUREAU, DOMESTIC MIGRATION ACROSS REGIONS, DIVISIONS, AND STATES: 1995 TO 2000 1 (2003), *available at* http://www.census.gov/prod/2003pubs/censr-7.pdf.

12. *See* DANIEL ROTHENBERG, WITH THESE HANDS: THE HIDDEN WORLD OF MIGRANT FARMWORKERS TODAY 31–34 (2000) (detailing the history and characteristics of farmworkers from the late nineteenth to the mid-twentieth century).

13. *See* Carole Marks, *Lines of Communication, Recruitment Mechanisms, and the Great Migration of 1916–1918*, 31 SOC. PROBS. 1, 1 (1983).

14. *See* Lauren Gilbert, *Fields of Hope, Fields of Despair: Legisprudential and Historic Perspectives on the AgJobs Bill of 2003*, 42 HARV. J. ON LEGIS. 417, 426–29 (2005).

15. *Id.* at 426–27.

all Asian and Eastern European immigration while permitting labor movement within the Western Hemisphere.[16] This influx of workers continued until the Great Depression and New Deal, when the Bureau of Immigration forcibly "repatriated" thousands of Mexican and Mexican American workers.[17]

President Franklin D. Roosevelt's New Deal heralded newfound protections for American workers and social welfare for the poor, but it largely ignored the plight of poor farmworkers in need of similar reforms.[18] New Deal programs failed to address the systematic abuses of farmworkers and effectively "institutionalized the second-class status of agricultural laborers."[19] When discussing the protection of farmworkers through wage and hour laws in Congress, Henry Wallace, the Secretary of Agriculture, reportedly exclaimed "We can't touch that. It's dynamite!"[20] The very idea of legislation favoring farmworkers was incendiary, largely due to farmworkers' race and ethnicity.[21] In a time when social welfare programs were the agenda, legislation favoring the class of largely African American sharecropping farmworkers was tabled in order to secure southern Democrats' pivotal votes,[22]

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16. *Id.* See HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 126–34 (2006) for an in-depth analysis of the National Origins Act and its effect on Asian American immigrants.

17. Gilbert, *supra* note 14, at 427 (explaining that many of those affected by the Bureau of Immigration's repatriation program were actually legal U.S. citizens and not Mexican citizens who had illegally entered the United States).

18. Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing Their Rights*, 18 HOFSTRA LAB. & EMP. L.J. 575, 582 (2001) (detailing the ways in which New Deal legislation denied farmworkers important rights that were granted to other workers). New Deal reforms such as the right to collective bargaining, the right to minimum and overtime wages, and the right to a safe workplace improved working conditions for every American worker except the agricultural laborer. *Id.*

19. ROTHENBERG, *supra* note 12, at 205.

20. DWIGHT MACDONALD, HENRY WALLACE: THE MAN AND THE MYTH 48 (2d ed. 1948).

21. *See* OXFAM AM., LIKE MACHINES IN THE FIELDS: WORKERS WITHOUT RIGHTS IN AMERICAN AGRICULTURE 1, 39 (2004), *available at* http://www.oxfamamerica.org/files/like-machines-in-the-fields.pdf.

> Racial prejudice has also played an important role in excluding farmworkers from the protections of labor laws. Like other manual laborers, farmworkers have often been ethnic minorities or immigrants. The migrant farmworker population was predominantly made up of African Americans before 1960 and, since then, is increasingly made up of recent immigrants and foreign guest workers from Latin America.

Id.

22. *See* Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1348–53 (1987) (explaining that the lack of farmworker legislation was a direct result of southern racism).

which were necessary for other New Deal reforms.[23] As a direct result of the New Deal's failure to remedy agricultural employment concerns, farmworkers earning just seventy percent of the industrial wage rate in the early 1900s earned only twenty-five percent of that rate by 1940.[24]

B. The Fallow Fields of Family Farming

Despite a national policy of agricultural protectionism, the number of family farms has steadily declined.[25] In 1990, the rural population was only 25% of the total U.S. population as compared to 43.7% of the population in 1930 and 95% in 1790.[26] Agricultural workers now account for less than two percent of the U.S. labor force, consisting of some 1.01 million hired farmworkers and 2.05 million farmers and family members.[27] Small farms still account for over ninety percent of all farms, but less than thirty percent of all agricultural production.[28]

As temporary guest worker programs ceased, agribusiness consolidated agriculture, and small farms were increasingly crunched for cash, family farms began hiring domestic migrant farmworkers and unauthorized immigrant workers.[29] Although both migrant and seasonal farmworkers[30] are a necessary part of agricultural work today, they only find farm work thirty-two to

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23. *Id.* Additionally, the industrial workers of the North belonged to powerful unions that could lobby for their interests, while farmworkers lacked any such organizational structure until long after World War II. *See infra* notes 92–93 and accompanying text.

24. *See* ROTHENBERG, *supra* note 12, at 35.

25. *See* Guadalupe T. Luna, *"Agricultural Underdogs" and International Agreements: The Legal Context of Agricultural Workers Within the Rural Economy*, 26 N.M. L. REV. 9, 44–47 (1996) (discussing the decline in small- and moderate-sized farms and the growth in large corporate farms).

26. U.S. GEN. ACCOUNTING OFFICE, B-251242, RURAL DEVELOPMENT: PROFILE OF RURAL AREAS 7–8 (1993).

27. WILLIAM KANDEL, U.S. DEP'T OF AGRIC., PROFILE OF HIRED FARMWORKERS, A 2008 UPDATE 2–3 (2008), *available at* http://www.ers.usda.gov/publications/err60/err60.pdf.

28. *Id.* at 3. Small farms are classified as those making less than $250,000 annually. *Id.*

29. *See* Holley, *supra* note 18, at 583–92 (depicting the shift to agricultural guest workers in the United States).

30. Migrant agricultural workers are defined as those working seasonally or temporarily on farm work which requires them to be absent overnight from their permanent place of residence, while seasonal agricultural workers are not required to be absent overnight from their permanent residence. 29 U.S.C. § 1802(8)(A), (10)(A) (2006).

thirty-six weeks of the year and it is difficult for them to find work out of season.[31]

II. Hardships of the Harvest

> *Farm laborers are excluded from minimum wage legislation and from unemployment insurance, and are at a disadvantage where social security is concerned. They are denied the collective bargaining rights guaranteed to non-farmworkers, and are effectively cut off from every benefit of a negotiated contract.*[32]

On Thanksgiving Day 1960, Edward R. Murrow broadcast the documentary *Harvest of Shame* on primetime television.[33] The documentary showed the public, for the first time since John Steinbeck's novel *The Grapes of Wrath*,[34] the daily hardships endured by farmworkers in order to put food on America's table. In his journalistic style, Murrow depicted these "workers in the sweatshops of the soil, the harvest of shame."[35] Sadly, as Murrow's documentary turns fifty, farmworkers like the Lopez family continue to face many of the same unresolved issues, such as low wages, widespread workplace injuries, and dangerous exposure to pesticides and herbicides.

A. Noncompetitive Wages for a Vulnerable Workforce

"We used to own our slaves, now we just rent them."[36]

Poverty among farmworkers is more than double that of all wage and salary employees in the United States[37] and farmworker wages have consistently been much lower than wages in similar blue-collar industries.[38] In 1967, farmworkers were the lowest-paid laborers,[39] and in 2001 hired farmworkers like Juana and

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31. *See* U.S. DEP'T OF LABOR, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 2001–2002: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARM WORKERS 25 (2005).

32. 91 CONG. REC. H28576 (daily ed. Oct. 3, 1969) (statement of César Chávez).

33. *CBS Reports: Harvest of Shame* (CBS television broadcast Nov. 26, 1960).

34. JOHN STEINBECK, THE GRAPES OF WRATH (Penguin Books 1976) (1939).

35. *CBS Reports: Harvest of Shame*, *supra* note 33.

36. *Id.* (quoting an unidentified Florida farmer).

37. KANDEL, *supra* note 27, at iv.

38. Jack L. Runyan, *Hired Farmworkers' Earnings Increased in 2001 but Still Trail Most Occupations*, RURAL AM., Fall 2002, at 67–68.

39. Letter from Loice Lance, migrant farmworker, to Hon. Harrison A. Williams, Subcomm. on Migrant Labor (Dec. 6, 1967), *in Migratory Labor Legislation: Hearing on S. 8, S. 195, S. 197, and S. 198 Before the Subcomm. on Migratory Labor of the S. Comm. on Labor and Pub. Welfare*, 90th Cong. 326 (1967) ("Farm industry is the largest industry in the United States and the Farm Laborer is the lowest paid.").

Miguel Lopez were working in the second-lowest-paid occupation in the United States.[40] As of 2006, the median wage for non-supervisory farmworkers was $6.75/hour[41] and $350/week.[42] Farmworkers are also routinely cheated out of overtime pay and unlikely to earn tips or commissions.[43]

B. Harm on the Farm

The low wages farmworkers receive belie the dangerous nature of the work. In 2007, agriculture earned the dubious honor of being the most dangerous industry sector in the United States in terms of its occupational fatality ratio.[44] From 1992 to 2006, sixty-eight crop workers died from heat stroke, "representing a rate nearly 20 times greater than for all U.S. civilian workers."[45] In addition to workplace deaths, farmworkers experience high rates of repetitive motion injuries from their backbreaking work positions.[46] Many, like Juana Lopez, walk with a stoop and still curse *el cortito*, the short-handled hoe outlawed in California in 1975 for its infliction of countless occupational injuries.[47] The grueling manual labor takes an immediate toll on farmworkers' health and has long-term negative effects, which farmworkers are unable to afford.[48]

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40. Runyan, *supra* note 38, at 68 (noting that private household workers and hired farmworkers are the two lowest-paid occupations in the United States, significantly lower than similar manual labor occupations).

41. *Briefing Rooms: Rural Labor and Education: Farm Labor,* ECON. RESEARCH SERV., U.S. DEP'T. OF AGRIC., http://www.ers.usda.gov/Briefing/LaborAndEducation/FarmLabor.htm (last updated Mar. 31, 2008).

42. KANDEL, *supra* note 27, at 21. Farmworker wages are significantly lower than wages of other manual laborers such as construction workers ($520/week), livestock handlers ($425/week), janitors ($420/week) and groundskeepers ($400/week). *Id.*

43. *Id.* at 16–17.

44. Press Release, Bureau of Labor Statistics, U.S. Dep't of Labor, National Census of Fatal Occupational Injuries in 2007, at 3 (Aug. 20, 2008), http://www.bls.gov/news.release/archives/cfoi_08202008.pdf.

45. Ctrs. for Disease Control & Prevention, *Heat-Related Deaths Among Crop Workers—United States, 1992–2006*, 57 MORBIDITY & MORTALITY WKLY REP. 649, 651 (2008). Even more striking is that the majority of these deaths occurred among foreign-born adults aged twenty to fifty-four years, a population not at high risk for heat illnesses. *Id.*

46. Holley, *supra* note 18, at 577–78.

47. *See infra* note 126 and accompanying text.

48. Thomas A. Arcury et al., *Pesticide Safety Among Farmworkers: Perceived Risk and Perceived Control as Factors Reflecting Environmental Justice*, 110 ENVTL. HEALTH PERSP. 233, 233–39 (2002). Pesticides' adverse health effects range from the acute, such as headaches, vomiting, respiratory failure, and comas, to the chronic, including cancer, neurological damage, and reproductive disabilities. *Id.* at 233.

C. The Human Impact of Pesticides and Herbicides

In 2000, pesticide expenditures totaled more than $11 billion in the United States and more than $32.5 billion worldwide.[49] One-third of all pesticides are known carcinogens, and they are ingested by farmworkers orally, dermally, and through inhalation.[50] In 1999, the Environmental Protection Agency (EPA) estimated that nearly twenty thousand farmworkers per year suffered acute pesticide poisoning.[51] Lymphoma and leukemia have been associated with higher death rates in midwestern farming regions with high pesticide use.[52] Minority workers make up a disproportionate percentage of fatalities and injuries in agriculture.[53] Since the days of the Bracero Program, foreign farmworkers in particular have borne the effects of pesticides,[54] partly due to the absence of adequate plumbing on-site for farmworkers like the Lopez family to rinse off these chemicals.[55] The Food Quality Protection Act,[56] however, fails to protect farmworkers in the same way it does consumers.[57]

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49. TIMOTHY KIELY, DAVID DONALDSON & ARTHUR GRUBE, U.S. ENVTL. PROT. AGENCY, PESTICIDES INDUSTRY SALES AND USAGE: 2000 AND 2001 MARKET ESTIMATES 4 (2004).

50. Keith Cunningham-Parmeter, *A Poisoned Field: Farmworkers, Pesticide Exposure, and Tort Recovery in an Era of Regulatory Failure*, 28 N.Y.U. REV. L. & SOC. CHANGE 431, 434, 441 (2004). In fact, the most popular pesticides, organophosphates, were developed as chemical weapons for their ability to attack the nervous system, but both sides in World War II deemed their toxic effects beyond the pale and neither used them in battle. Gilles Forget, *Pesticides: Necessary but Dangerous Poisons*, 18 INT'L DEV. RES. CTR. REP. 4, 5 (1989). However, scientists noticed that organophosphates affected insects as well as humans, and after the war they were used as insecticides. *Id.*

51. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-01-501T, INFORMATION ON PESTICIDE ILLNESS REPORTING SYSTEMS 1 (2001). This estimate may be much too low given that no comprehensive national data are available. *Id.*

52. Council on Scientific Affairs, Am. Med. Ass'n, *Council Report: Cancer Risk of Pesticides in Agricultural Workers*, 260 JAMA 959, 961 (1988).

53. *See, e.g.*, Ctrs. for Disease Control & Prevention, *supra* note 45, at 651. For example, from 2003 to 2006 seventy-one percent of occupational heat-related deaths were attributable to migrant crop workers from Mexico or Central and South America. *Id.*

54. In 1959, for example, the California State Division of Industrial Safety investigated 143 cases of organic phosphate poisoning and reported that "the typical victim was of Mexican descent, did not speak or read English, and knew nothing of the hazards to which he was exposed." ERNESTO GALARZA, MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY 196 (1964). The Bracero Program was established in the 1940s through agreements between the United States and Mexico which permitted Mexicans to work as temporary migrant laborers in the United States. *See id.* at 46–52.

55. KANDEL, *supra* note 27, at 33.

56. Food Quality Protection Act of 1996, Pub. L. No. 104-170, 110 Stat. 1513.

57. Zachary Wolfe & Roger Rosenthal, *Fields of Opportunity: Protecting Farmworkers Through a Broader Statutory Interpretation*, 33 CLEARINGHOUSE REV.

Pesticides keep crop costs down for producers and consumers, but this cost calculation fails to account for the costs to farmworkers, which are invisible to most consumers.[58] The EPA is charged with ensuring the safety of farmworkers in the fields.[59] Its efficacy, however, is severely diminished because the EPA must consider the effect of civil penalties on the agricultural employer under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA);[60] as a result, penalties are generally smaller and rarer than similar penalties under the Occupational Safety and Health Act (OSH Act).[61]

Herbicides forever changed the face of farming in 1946 with the introduction of 2,4-D.[62] Despite the fact that over two hundred herbicide-resistant species have evolved worldwide, herbicides are relied upon by most farmers, who "have found that chemical herbicides are more cost-effective than migrant laborers."[63] Studies of farmers in Kansas, Canada, and Italy have linked pesticide exposure with non-Hodgkin's lymphoma.[64] Whether

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701, 703 (2000) ("[A]lthough many people are in principle enjoying better protection against harmful pesticides because of the Food Quality Protection Act, farmworker exposure on the job remains at high levels, in part because the Act mandates that the Environmental Protection Agency consider only 'nonoccupational sources.'" (citing 21 U.S.C.A. § 346a(b)(2)(D)(vi) (West 1998)). Such nonoccupational sources include pesticide use in residential areas and consumer exposure to pesticides through produce. 21 U.S.C.A. § 346a(b)(2)(D)(vi).

58. Arcury, *supra* note 48, at 233 (analyzing the disproportionate effects of pesticides on farmworkers). In fact, the very name "insecticide" is misleading in that the toxins "are not selective poisons; they do not single out the one species of which we desire to be rid." RACHEL CARSON, SILENT SPRING 99 (1962). Rather, as Carson contended in the 1962 environmental manifesto *Silent Spring*, "[t]hey should not be called 'insecticides,' but 'biocides.'" *Id.* at 8.

59. *See infra* notes 79–83 and accompanying text.

60. Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136*l*(a)(4) (2006).

61. *See* Occupational Safety and Health Act of 1970, 29 U.S.C. § 666(j) (1970); Cunningham-Parmeter, *supra* note 50, at 451–52 (explaining that the EPA, in determining sanctions, undertakes a cost-benefit analysis that considers employer size and the penalty's effect on business); Michael T. Olexa, *Pesticide Use and Impact: FIFRA and Related Regulatory Issues*, 68 N.D. L. REV. 445, 448 (1992).

62. Dan Gunderson, *Herbicide Resistant Weeds Threaten National Agriculture* (Minnesota Public Radio broadcast Aug. 21, 2000), *available at* http://news.minnesota.publicradio.org/features/200008/21_gundersond_weeds-m/. The first synthetic herbicide, 2,4-D, is widely believed to be responsible for the significant annual increases in crop production during the 1950s. David C. Bridges, *Benefits of Triazine Herbicides in Corn and Sorghum Production*, *in* THE TRIAZINE HERBICIDES: 50 YEARS REVOLUTIONIZING AGRICULTURE 163, 163 (Homer M. LeBaron et al. eds., 2008).

63. Gunderson, *supra* note 62.

64. Irva Hertz-Picciotto, *How Scientists View Causality and Assess Evidence: A Study of the Institute of Medicine's Evaluation of Health Effects in Vietnam Veterans and Agent Orange*, 13 J.L. & POL'Y 553, 580–82 (2005).

acute or chronic, pesticides' negative effects on farmworkers contribute to making agriculture one of the most dangerous industries.[65] As a result of acute and chronic pesticide illness, as well as workplace injuries, the life expectancy of migrant farmworkers is forty-nine years, while the national average is seventy-five years.[66]

III. The Inadequacy of Current Statutory Protections

The current patchwork of laws and regulations covering most American workers offers only minimal protections to farmworkers, and in particular to migrant workers and international immigrants. Multiple exemptions, lack of inspection mechanisms, and lax enforcement of these federal and state laws fail to safeguard farm hands and result in dangerous working conditions for hundreds of thousands of agricultural workers.[67]

A. Fair Labor Standards Act and Its Blind Spot for Farmworkers

The exemption of farmworkers from the protections of the Fair Labor Standards Act (FLSA)[68] evidences U.S. agricultural protectionism.[69] FLSA generally requires payment of minimum wages, standard record keeping, and compliance with child labor regulations.[70] Despite the dangerous working conditions on farms, FLSA expressly exempts child farmworkers from numerous protective provisions.[71] For example, children younger than twelve can work on their parents' farm, children twelve to thirteen years old can work with parental consent, and children aged fourteen and older can work without consent.[72] Agricultural workers employed either on small farms or for seasonal work are exempted from both minimum wage and overtime pay.[73] The

65. OXFAM AM., *supra* note 21, at 2.

66. Sonia Sandhaus, *Migrant Health: A Harvest of Poverty*, 98 AM. J. NURSING 52, 52 (1998).

67. *See* Cunningham-Parmeter, *supra* note 50, at 457–59.

68. Fair Labor Standards Act § 13, 29 U.S.C. § 213(a)–(c) (2006).

69. *See infra* note 196 and accompanying text. *See also* Cunningham-Parmeter, *supra* note 50, at 463–64 (explaining that a large agricultural lobby at FLSA's inception prevented the protections of the FLSA from applying to most farmworkers).

70. 29 U.S.C. §§ 206, 211(c), 212.

71. *Id.* § 213(c)(1)(A)–(C).

72. Thus, for example, children younger than twelve can have free range to work around a farm's dangerous equipment. *See id.*

73. *Id.* § 213(a)(6)(A) ("The provisions . . . shall not apply with respect to . . . any employee employed in agriculture if such employee is employed by an employer

exemption also abrogates perhaps the most important portion of FLSA: the anti-retaliation provision, which allows workers to safely exercise their rights granted by other provisions of FLSA.[74]

B. *OSH Act,[75] Federal Food, Drug, and Cosmetic Act (FFDCA),[76] and FIFRA[77]: Good Intentions that Fail to Protect Farmworkers*

OSH Act, FIFRA, and FFDCA all contain provisions pertinent to farmworkers, but their procedural guarantees fall short in actual practice. The FFDCA largely regulates pesticide residue on foods, protecting consumers, not farmworkers,[78] while FIFRA establishes a regulatory system for all pesticides to be approved by the EPA.[79] In 1996, the EPA issued the Worker Protection Standard (WPS), a regulation requiring "workplace practices designed to reduce or eliminate exposure to pesticides . . . ."[80] The WPS mandated posting pesticide safety information,[81] field re-entry restrictions,[82] and notice to workers of pesticide applications.[83] The WPS, however, is difficult to implement, and the EPA's enforcement of this standard through state cooperation is largely limited to seminal events, applied retroactively rather than preventatively.[84]

The OSH Act and its implementing regulations also have

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who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor."). It is unlikely that employers using a large crew for one or two weeks would reach the five hundred man-days threshold required under the FLSA. David M. Saxowsky et al., *Employing Migrant Agricultural Workers: Overcoming the Challenge of Complying with Employment Laws*, 69 N.D. L. REV. 307, 316 (1993).

74. 29 U.S.C. § 215(a)(3) ("[I]t shall be unlawful for any person to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter . . . .").

75. Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–78 (2006).

76. Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301–94 (2006).

77. Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136–136y (2006).

78. 21 U.S.C. § 346.

79. 7 U.S.C. § 136w.

80. 40 C.F.R. § 170.1 (2009).

81. *Id.* § 170.135(a).

82. *Id.* § 170.112(a).

83. *Id.* § 170.120(b).

84. *See* U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-00-40, PESTICIDES: IMPROVEMENTS NEEDED TO ENSURE THE SAFETY OF FARMWORKERS AND THEIR CHILDREN 20–25 (2000) ("[W]ithout a valid means of monitoring acute pesticide illnesses, there is no way to determine whether risk assessment and management practices are effective in preventing hazardous exposure incidents.").

numerous substantive provisions which could potentially impact field conditions but which still fall short.[85] Under the OSH Act, the Occupational Safety and Health Administration (OSHA) has clear enforcement standards, powerful management systems, "right-to-know" protections, inspections and monitoring procedures, and significant penalties.[86] The OSH Act ultimately fails to adequately protect farmworkers, however, because it grants no private right of action[87] and is under-enforced by OSHA.[88]

C. Other Legislation that Lacks Farmworker Protection

Additionally, farmworkers remain excluded from most general employment statutes. Agricultural labor has long been exempted from the Federal Insurance Contributions Act of 1954,[89] the Federal Unemployment Tax Act,[90] and state unemployment

85. *See, e.g.*, 29 U.S.C. § 654 (2006) (requiring employers to provide a worksite "free from recognized hazards"); *id.* § 657 (authorizing inspection of worksites); OSHA Field Sanitation Standard, 29 C.F.R. § 1928.110 (1987) (requiring agricultural employers to provide hand-washing facilities, toilets, and potable water of certain minimum quality where eleven or more farmworkers are engaged in manual labor).

86. *E.g.*, 29 U.S.C. § 657, (2006).

87. *Id.* §653(b)(4) ("Nothing in this chapter shall be construed . . . to enlarge or diminish or affect in any other manner [a worker's] common law or statutory rights . . . ."); Am. Fed'n of Gov't Emps., AFL-CIO v. Rumsfeld, 321 F.3d 139 (D.C. Cir. 2003) ("[I]t is now well established that 'OSHA violations do not themselves constitute a private cause of action for breach.'") (internal citation omitted); *see* Laura Lockard, *Toward Safer Fields: Using AWPA's Working Arrangement Provisions to Enforce Health and Safety Regulations Designed to Protect Farmworkers*, 28 N.Y.U. REV. L. & SOC. CHANGE 507, 513 (2003).

88. *Id.* at 514 (noting that farmworker rights are rarely enforced since OSH Act targets inspections at "imminent danger or . . . immediate fatalities" and agriculture fits neither of these categories). OSHA, for instance, conducted just over 39,000 worksite inspections in all industries in 2007, despite the fact that there were 7.1 million worksites in 2004. Fritz Ebinger, *Exposed to the Elements: Workers' Compensation and Unauthorized Farm Workers in the Midwest*, 13 DRAKE J. AGRIC. L. 263, 276 (2008); *OSHA Enforcement: Striving for Safe and Healthy Workplaces*, OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T OF LABOR, http://www.osha.gov/dep/enforcement/enforcement_results_07.html (last visited Oct. 9, 2010). Agriculture is not deemed a priority for OSHA; therefore, agricultural inspections happen even more infrequently than in other occupations. *Id.* Overall, however, there are more than 2.2 million farms which would account for nearly thirty percent of the nation's total worksites if all farms were deemed worksites by OSHA. NAT'L AGRIC. STATISTICS SERV., U.S. DEP'T OF AGRIC., AC-07-A-51, 2007 CENSUS OF AGRICULTURE 66 (2009).

89. Federal Insurance Contributions Act §3121, 26 U.S.C. § 3121 (2006). The Act exempts foreign temporary guest workers and most farmworkers. *Id.* § 3121(b)(1), (g).

90. Federal Unemployment Tax Act, 26 U.S.C. § 3306 (2006). An agricultural employer is not subject to this Act if the employer paid less than $20,000 quarterly in wages for agricultural labor or did not employ ten or more individuals for more

insurance acts.[91] The National Labor Relations Act (NLRA)[92] expressly excludes "any individual employed as an agricultural laborer" from its union protection provisions.[93] The exemption of farmworkers from these unemployment statutes makes them extremely vulnerable to employers' threats of termination, and their exclusion from the NLRA means that they lack the power to advocate for themselves through union organizing.[94]

D. The Migrant and Seasonal Agricultural Worker Protection Act[95]: A Beginning, Not an End, for Farmworker Justice

Due to this exclusion of farmworkers from almost every other employment statute, MSAWPA was crafted to "assure necessary protections for migrant and seasonal agricultural workers . . . ."[96] Its predecessor, the Farm Labor Contractor Registration Act of 1963 (FLCRA),[97] was the first federal labor statute to expressly regulate the agricultural employment relationship,[98] forcing farm labor contractors to comply with health and safety regulations and attempting to offset the numerous inequalities between employer and employee.[99] In 1974, FLCRA was amended to include harsher

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than twenty days, with each day falling during a different calendar week during that or the preceding calendar year. *Id.* § 3306(a)(2).

91. *E.g.*, *In re* Wenatchbee Beebe Orchard Co., 133 P.2d 283, 285 (Wash. 1943) (holding that fruit packing was agricultural labor and therefore exempt from Washington state unemployment law). In Minnesota, employers are exempt from providing health care insurance if they hire fewer than five migrant labor farmworkers or if an employee performs "exclusively agricultural labor . . . ." MINN. STAT. § 181.73 (2004).

92. National Labor Relations Act, 29 U.S.C. §§ 151–69 (2000).

93. *Id.* § 152(3). Despite César Chávez's successful efforts with the United Farm Workers to unionize migrant farmworkers in California in the 1970s, CÉSAR CHÁVEZ: A BRIEF BIOGRAPHY WITH DOCUMENTS 15 (Richard W. Etulain ed., 2002), few farmworkers today can or do unionize due to the exclusion of farmworkers from the NLRA. *See* ROTHENBERG, *supra* note 12, at 248.

94. *See* OXFAM AM., *supra* note 21, at 39.

95. Migrant and Seasonal Agricultural Worker Protection Act, Pub. L. No. 97-470, 96 Stat. 2583 (1983) (codified at 29 U.S.C. §§ 1801–72 (2006)).

96. *Id.* § 1801.

97. Farm Labor Contractor Registration Act of 1963, Pub. L. No. 88-582, 78 Stat. 920 (1964) (repealed 1983).

98. *See* Marion Quisenbery, *A Labor Law for Agriculture: The Migrant and Seasonal Agricultural Workers' Protection Act*, 30 S.D. L. REV. 311, 311–12 (1985).

99. Mark J. Russo, *The Tension Between the Need and Exploitation of Migrant Workers: Using MSAWPA's Legislative Intent to Find a Balanced Remedy*, 7 MICH. J. RACE & L. 195, 203 (2001) (explaining that the purpose of FLCRA was to offset the unequal bargaining power between employers and employees and to require full disclosure regarding key aspects of employment, such as housing).

penalties and to strengthen enforcement measures,[100] as well as to stipulate that employment information must be conveyed in a language understood by the farmworker.[101] Ultimately, however, FLCRA "failed to reverse the historical pattern of abuse and exploitation of migrant and seasonal farm workers,"[102] largely because it only regulated the farm labor contractor[103] and because its protections had seven large exemptions.[104]

MSAWPA was enacted in 1983[105] to remedy these weak protections of FLCRA.[106] MSAWPA regulates agricultural employers in addition to labor contractors.[107] Among its substantive protections for migrant agricultural workers are requirements of full disclosure of working conditions in the recruitment process,[108] conspicuous posting of workers' rights under MSAWPA,[109] and notices posted in whatever languages are common to the workers.[110] Agricultural employers are prohibited from violating "the terms of any working arrangement,"[111] which could include wages, supplies, tools, or other work-related

100. *See* Farm Labor Contractor Registration Act Amendments of 1974, Pub. L. No. 93-518, sec. 13, § 9, 88 Stat. 1652, 1656–57 (repealed 1983).

101. *See id.* sec. 10, § 6(b), at 1655. MSAWPA contains a similar requirement. 29 U.S.C. § 1831(f) (2006) ("Such information shall be provided in English or, as necessary and reasonable, in Spanish or other language common to seasonal agricultural workers who are not fluent or literate in English.").

102. H.R. REP. NO. 97-885, at 3 (1982).

103. Lockard, *supra* note 87, at 522. The farm labor contractors were subcontractors who did the hiring and transporting of migrant farmworkers and therefore distanced the agricultural employers from liability. *See id.*

104. *See* Russo, *supra* note 99, at 203. Among the exemptions were those for nonprofit organizations, farmers supplying workers solely for their own farm, any person engaging in activity solely within a twenty-five-mile radius for no more than thirteen weeks per year, and any person employing legal foreign guest workers. Farm Labor Contractor Registration Act Amendments of 1974, sec. 2, § 3, at 1652–53.

105. Migrant and Seasonal Agricultural Worker Protection Act, Pub. L. No. 97-470, 96 Stat. 2583 (1983) (codified at 29 U.S.C. §§ 1801–72 (2006)).

106. Lockard, *supra* note 87, at 522.

107. 29 U.S.C. § 1854(a); Sunil Bhave, *Opening the Courtroom Doors for Migrant Workers: The Need for a Nationwide Service of Process Amendment to the Migrant and Seasonal Agricultural Worker Protection Act*, 47 ST. LOUIS U. L.J. 899, 906 (2003).

108. 29 U.S.C. § 1821(a) (requiring recruiters to disclose wage rates, crops to be farmed, transportation, housing, costs to be charged, and commissions).

109. *Id.* § 1821(b) ("Each . . . agricultural employer . . . shall, at the place of employment, post in a conspicuous place a poster . . . setting forth the rights and protections afforded such workers under this chapter . . . .").

110. *Id.* § 1821(g) (requiring notices and forms to be posted in the employees' language of literacy).

111. *Id.* § 1822(c).

MSAWPA also stipulates motor vehicle safety requirements for migrant worker transportation.[113]

Despite Congress's intention to better address the problems faced by agricultural workers, MSAWPA contains a number of holes that prevent the Act from attaining that goal. First, MSAWPA does not expressly cover health regulations under its "working arrangements" provision,[114] although its legislative history suggests that Congress considered the health risks to be serious.[115] Second, MSAWPA leaves large exemptions for family farms and small farms.[116] Additionally, MSAWPA provides for enforcement through both criminal and administrative action, but fails to provide for adequate inspections of agricultural employers.[117] Finally, though MSAWPA—unlike other farmworker protections—creates a private right of action for enforcement of its provisions,[118] this mechanism is only useful if agricultural employees can successfully bring a claim to court.[119]

IV. Macro and Micro Solutions to MSAWPA's Flawed Farmworker Protections

In order to more fully safeguard domestic migrant farmworkers, the current legislative patchwork must be further developed. Though MSAWPA is federal legislation, both state and international law may serve as models for providing farmworkers access to justice.

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112. *See id.* § 1822(a)–(b).

113. *Id.* § 1841.

114. *Id.* § 1832(c) ("No farm labor contractor, agricultural employer, or agricultural association shall, without justification, violate the terms of any working arrangement made by that contractor, employer, or association with any seasonal agricultural worker.").

115. H.R. REP. NO. 97-885, at 2 (1982) (stating that Congress considered migrant and seasonal farmworkers the "most abused of all workers in the United States"). In debating MSAWPA, Congress cited numerous instances of farmworker abuse, including a tragic accident in which forty-seven teenage farmworkers were involved in a serious car crash while being transported in the back of a truck. *Id.* at 3.

116. *See infra* notes 200–208 and accompanying text.

117. *See infra* notes 178–192 and accompanying text. MSAWPA provides that the Secretary of Labor "shall, as may be appropriate, investigate, and . . . enter and inspect such places . . . and such records . . . [and] question such persons and gather such information to determine compliance with this chapter . . . ." 29 U.S.C. § 1862(a).

118. 29 U.S.C. § 1854.

119. *See infra* note 185 and accompanying text; *see also* Bhave, *supra* note 107, at 910–11 (explaining the difficulties migrant farmworkers face in exercising personal jurisdiction over agricultural employers).

A. State Statutes

Given the inadequacies of federal legislation in protecting farmworkers, some states have crafted their own statutes to safeguard farmworkers laboring in one of this nation's most dangerous occupations.[120] Florida regulations require agricultural employers with five to ten workers to meet the same field sanitation standard expected of employers with more than ten employees under OSHA requirements, ensuring that all but the very smallest Florida farmers adhere to minimum safety standards.[121] Additionally, Florida grants government officials as well as health and legal services providers largely unrestricted access to migrant housing,[122] thereby enabling more effective monitoring of contractor and employer compliance with these safety standards.

California has a long-standing legacy of guaranteeing stronger protections for farmworkers, largely as a result of legendary advocate César Chávez.[123] Nearly one hundred years after the California Land Settlement Act[124] significantly curtailed the land rights of Mexicans and Mexican Americans,[125] Chávez succeeded in organizing farmworkers and ridding the fields of short-handled hoes,[126] causing California to take ergonomics into account in evaluating work injuries for farmworkers.[127] Chávez

120. OXFAM AM., *supra* note 21, at 2–3 (critiquing federal and most state laws as providing inadequate protections for farmworkers).

121. *Compare* FLA. ADMIN. CODE ANN. r. 64E-14.016 (2007) (requiring any location in which five to ten farmworkers are employed to provide one toilet facility, one hand washing unit, and cool, potable drinking water served in single-serve cups) *with* OSHA Field Sanitation Standard, 29 C.F.R. § 1928.110 (1987) (requiring any agricultural establishment in which more than ten employees are working to provide one toilet and hand-washing facility for every twenty employees and cool, potable drinking water served in single-use cups).

122. *See* FLA. STAT. ANN. §§ 381.008(6), 381.0088, 381.00897(2) (West 2007).

123. *See* OXFAM AM., *supra* note 21, at 44.

124. Act of March 3, 1851, ch. 41, 9 Stat. 631.

125. Christine A. Klein, *Treaties of Conquest: Property Rights, Indian Treaties, and the Treaty of Guadalupe Hidalgo*, 26 N.M. L. REV. 201, 220–21 (1996) (discussing the California Land Settlement Act of 1851 which required individuals of Spanish or Mexican origin who had land rights to show affirmative proof of their legal land ownership). The California Land Settlement Act was one of the various laws used by the United States to divest property from those already living in the New World. *Id.*

126. Douglas L. Murray, *The Abolition of El Cortito, the Short-Handled Hoe: A Case Study in Social Conflict and State Policy in California Agriculture*, 30 SOC. PROBS. 26, 31–32 (1982) (depicting the seven-year struggle to outlaw short-handled hoes in the fields of California). Short-handled hoes, or *cortitos*, were literally backbreaking harvesting implements, which came to signify farmworkers' oppression. *Id.* at 29–30.

127. *See* CAL. CODE REGS. tit. 8, § 5110 (2000) (requiring employers to institute

also advocated for union representation in the fields,[128] something that had been denied farmworkers since the passage of the NLRA.[129] The outcome of this advocacy was California's Agricultural Labor Relations Act of 1975,[130] which assured California farmworkers the right to organize and bargain collectively.[131] While less than ten percent of California farmworkers were unionized in 2004,[132] even fewer are able to do so under federal law.[133] California agricultural legislation also assures farmworkers a state minimum wage[134] and unemployment compensation.[135] Unlike the FLSA, which exempts farmworkers from overtime pay,[136] California law ensures standard overtime pay of one-and-a-half times that of regular pay.[137] Like Florida,[138] California laws require OSHA-style field sanitation standards.[139] California, however, applies these standards to all employers, even if they only hire a single farmworker.[140] Farm labor contractors are required to register with the Labor Commissioner and meet certain safety minimums for the transportation of migrants.[141]

California's most important contribution to the national dialogue on farmworker protections is its pesticide legislation. While the EPA lacks strong enforcement or monitoring mechanisms for agricultural employers,[142] California—the largest agricultural state—has chartered several laws which aim to

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measures to reduce repetitive motion injuries and mandatory training for employees).

128. OXFAM AM., *supra* note 21, at 44.

129. National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151–69).

130. Agricultural Labor Relations Act of 1975, CAL. LAB. CODE § 1152, 1975 Cal. Stats. 3rd Ex. Sess. 4013 (West 2009) ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .").

131. *Id.*; *see* CÉSAR CHÁVEZ: A BRIEF BIOGRAPHY WITH DOCUMENTS, *supra* note 93, at 16.

132. *See* OXFAM AM., *supra* note 21, at 44.

133. *See* 29 U.S.C. § 152(3) (excluding agricultural laborers from union protection provisions).

134. CAL. CODE REGS. tit. 8, § 11000 (2010) (guaranteeing wages of at least $6.75 per hour for all workers, including agricultural laborers).

135. *Id.* tit. 22, §§ 1251-1–1265.6-1.

136. 29 U.S.C. § 213(a)(6) (2006).

137. CAL. LAB. CODE § 510 (West 2003).

138. *See supra* note 121 and accompanying text.

139. CAL. LAB. CODE § 6712.

140. *Id.*

141. *Id.* §§ 1695(a)(9), 1696.4.

142. *See supra* note 84 and accompanying text.

establish a high threshold and create accountability in the pesticide arena.[143] First, California requires trainings from industry-qualified instructors for those working with pesticides.[144] Second, pesticides must be registered and periodically reregistered.[145] Third, a person who orders a farmworker into a field in violation of reentry requirements is guilty of a misdemeanor offense for each affected worker.[146] Additionally, California provides for mandatory, employer-provided medical exams for employees working with carcinogens.[147] The fines for failure to report carcinogen use are substantial, ranging from a minimum of $500 to a $10,000 penalty for repeated serious violations.[148]

B. International Models of Farmworker Protections

International law also serves as a model for improving the plight of farmworkers in the United States. In a globalized world, variances in farmworker protections have international implications and a survey of current international farmworker conventions and recommendations can help establish an acceptable baseline for American domestic law.

1. International Labour Organization

The International Labour Organization (ILO) was founded in 1919 and adopted as the United Nations' first specialized agency in 1946.[149] The ILO recently adopted the Convention Concerning Safety and Health in Agriculture (ILO Safety Convention), although the United States has yet to ratify it.[150] This important international agreement stipulates that farmworkers must be

143. *See* CAL. FOOD & AGRIC. CODE § 12980 (West 2001) ("The Legislature hereby finds and declares that it is necessary and desirable to provide for the safe use of pesticides and for safe working conditions for farmworkers . . . .").

144. *Id.* § 12986(a)–(b).

145. *See id.* § 12988.

146. *Id.* § 12985.

147. CAL. LAB. CODE § 9040 (West 2003).

148. *Id.* § 9060. The Code establishes a $2000 minimum fine for serious violations and a $5000 fine for repeated violations. *Id.*

149. *About the ILO*, INT'L LAB. ORG. [ILO], http://www.ilo.org/global/about_the_ILO/lang--en/index.htm (last visited Sept. 11, 2010).

150. Convention Concerning Safety and Health in Agriculture, June 21, 2001, ILO-C184, 2227 U.N.T.S. 243 [hereinafter ILO Safety Convention]. This convention has been ratified by thirteen countries, including Argentina, Finland, Luxembourg, Slovakia, Sweden, and Uruguay. *ILOLEX Database of International Labour Standards: Convention No. C184*, ILO, http://www.ilo.org/ilolex/english/convdisp1.htm (follow "C184" hyperlink; then follow "See the ratifications for this Convention" hyperlink) (last visited Oct. 9, 2010).

informed of the effect of new technology on their health,[151] and that agricultural employers must ensure that training accounts for the education and language abilities of the farmworkers.[152] The ILO Safety Convention also provides that workers have the right to remove themselves from work dangers with no resulting disadvantage.[153]

The ILO has issued other conventions which could also impact the situation of farmworkers in the United States. In 1990, the ILO issued a convention regarding workplace chemicals[154] stating that "the protection of workers from the harmful effects of chemicals also enhances the protection of the general public and the environment . . . ."[155] Much like California law,[156] the Convention Concerning Safety in the Use of Chemicals at Work (ILO Chemical Convention) states that employers should not only prevent exposures, but also assess, monitor, and record exposures, and be liable to a competent authority for their employees' health and safety.[157] Similarly, the ILO Convention Concerning Labour Inspection in Agriculture (ILO Labour Inspection Convention), signed in 1969, provides that agricultural labor inspections should monitor wages, workplace safety, and health, as well as the employment of women and children.[158]

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151. ILO Safety Convention, *supra* note 150, at 246 ("Workers in agriculture shall have the right . . . to be informed and consulted on safety and health matters including risks from new technologies . . . .").

152. *Id.* at 245–46 ("[T]he employer shall . . . ensure that adequate and appropriate training and comprehensible instructions . . . are provided to workers in agriculture . . . taking into account their level of education and differences in language . . . .").

153. *Id.* at 246 ("Workers in agriculture shall have the right . . . to remove themselves from danger . . . when they have reasonable justification to believe there is an imminent and serious risk to their safety and health . . . . They shall not be placed at any disadvantage as a result of these actions.").

154. 73 ILO, *Convention Concerning Safety in the Use of Chemicals at Work*, *in* OFFICIAL BULLETIN: SERIES A 71 (1992) [hereinafter ILO Chemical Convention]. This convention has been ratified by seventeen countries, including Brazil, China, Germany, Italy, Mexico, Norway, Poland, and Zimbabwe, though not the United States. *ILOLEX Database of International Labour Standards: Convention No. C170*, ILO, http://www.ilo.org/ilolex/english/convdisp1.htm (follow "C170" hyperlink; then follow "See the ratifications for this Convention" hyperlink) (last visited Oct. 9, 2010).

155. ILO Chemical Convention, *supra* note 154, at 71. The ILO's concern with farmworker safety contrasts with the concerns of the EPA, which almost exclusively monitors the effects of pesticide exposure on consumers, without assessing their effects on farmworkers. *See* Wolfe & Rosenthal, *supra* note 57, at 703.

156. *See* CAL. FOOD & AGRIC. CODE § 12980 (West 2001).

157. ILO Chemical Convention, *supra* note 154, at 75–76.

158. Convention Concerning Labour Inspection in Agriculture, June 25, 1969, ILO C129, 812 U.N.T.S. 88 [hereinafter ILO Labour Inspection Convention]. This

The ILO Safety Convention, the ILO Labour Inspection Convention, and the ILO Chemical Convention all establish important international norms that could serve as models for revising MSAWPA to more effectively protect agricultural workers within the United States.

2. National Labor Courts

Although employment sectors in the United States are governed by numerous federal laws, state laws, and administrative agencies, most of the world uses labor courts to settle labor disputes and adjudicate employment claims.[159] While many labor courts could serve as models for an agricultural worker agency, the Swedish and Israeli labor courts are uniquely suited to the United States' situation.

The Swedish Labor Court (*Arbetsdomstolen*) is a tripartite court that rules on all employment-related matters.[160] The court consists of three chairmen, three vice-chairmen, and sixteen lay members.[161] All members of the court are government-appointed.[162] The chairmen and vice-chairmen must be neutral and be lawyers with judicial experience, and at least two of the lay members must be neutral and possess specialized employment knowledge.[163] The remaining lay members are selected from a group of individuals nominated by unions, employers, and government authorities.[164] The unique makeup of the Swedish Labor Court makes it both a respected, neutral arbiter of employment disputes and an administrative body imbued with first-hand knowledge of the employment sector.[165] Its decisions, therefore, appear, and in fact are, more just for both parties involved, resulting in greater compliance with and respect for the

convention has been ratified by forty-nine countries, including Denmark, Egypt, France, Germany, Hungary, Iceland, Italy, the Netherlands, Norway, Portugal, Spain, and Ukraine. *ILOLEX Database of International Labour Standards: Convention No. C129*, ILO, http://www.ilo.org/ilolex/english/convdisp1.htm (follow "C129" hyperlink; then follow "See the ratifications for this Convention" hyperlink) (last visited Oct. 9, 2010). The United States is conspicuously absent from this "who's who" of the developed world.

159. *See* Benjamin Aaron, *The NLRB, Labor Courts, and Industrial Tribunals: A Selective Comparison*, 39 INDUS. & LAB. REL. REV. 35, 36 (1985) (comparing the methods and effectiveness of labor courts and the NLRB in resolving employment disputes).

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 37.

labor court.[166]

The Israeli National Labor Court is also a tripartite judicial body, which has succeeded in effectively managing all of Israel's employment issues without ignoring large sectors of the workforce.[167] The court "considers all employees—whether residents or migrant, whether with or without permits—as fully covered by labor and employment laws."[168] While the government and legislature have proved largely ineffective in protecting migrant and immigrant workers,[169] the Israeli National Labor Court has prohibited employers from holding workers' passports[170] and has relaxed procedural and evidentiary rules to facilitate legitimate migrant worker lawsuits.[171] The court's willingness to adjudicate *all* employment claims, regardless of the industry and the individual's residence status, has greatly aided in protecting *all* of Israel's workers.

V. Mending the Hodgepodge of Farmworker Legislation by Revising MSAWPA

The current smattering of statutes has failed to properly protect farmworkers in U.S. fields, resulting in depressed wages, deadly work environments, and oppressive labor conditions for a uniquely vulnerable community.[172] While numerous regulations and statutes could be amended to better safeguard farmworkers' rights, MSAWPA is best suited to protect farmworkers because of both its breadth of coverage and its specific focus on agricultural laborers.[173] In reforming MSAWPA, Congress could simultaneously remedy the inequalities farmworkers face in FLSA, OSH Act, FIFRA, FFDCA, and other federal and state laws.[174]

Much as MSAWPA improved upon FLCRA in 1983,[175]

166. *See id.*

167. *See* Guy Davidov, *Enforcement Problems in "Informal" Labor Markets: A View from Israel*, 27 COMP. LAB. L. & POL'Y J. 3, 20 (2005) (explaining that the National Labor Court's jurisdiction over "all employees" has made it more effective than the other branches of government in ensuring justice for migrant workers).

168. *Id.*

169. *See id.* at 13–21.

170. *Id.* at 20 (citing Labor Appeal 1459/02 Buchiman v. Best Entrepreneurship and Const. Ltd., 38 P.D.A. 824 (2003) (Isr.)).

171. *Id.* (citing Labor Appeal 1127/00 Orsatz v. Denya Sibus Ltd., 37 P.D.A. 305 (2002) (Isr.) (finding that even when a migrant worker leaves the country before his or her scheduled cross-examination, the case will proceed)).

172. *See* discussion *supra* Part II.

173. *See* discussion *supra* Part III.D.

174. *See* discussion *supra* Parts III.A–C.

175. *See supra* note 106 and accompanying text.

legislative reform of MSAWPA would make farm work more appealing to domestic workers and largely eliminate the low-paid, vulnerable sub-class which is now composed predominantly of undocumented immigrants or "working poor" domestic migrant families.[176] In order to right the injustice in our nation's fields, this legislative remedy must address MSAWPA's lack of enforcement, inspections, and adjudications; its excessive exemptions; and its failure to regulate working conditions.[177]

A. MSAWPA's Enforcement and Inspection Mechanisms

MSAWPA should be reformed to make its enforcement and inspection provisions significant enough to deter violations of its mandates and to create an administrative body to preside over all employment claims arising out of farm work. Currently, under MSAWPA's enforcement mechanism, a willful and knowing violation can result in a $1000 maximum fine, a one-year prison sentence, or both; subsequent violations increase the penalty to a $10,000 maximum fine, a three-year prison term, or both.[178] The Secretary of Labor may petition *sua sponte* for injunctive relief,[179] and MSAWPA allows individuals to pursue private rights of action.[180] The Secretary of Labor is solely responsible for investigating work environments, housing, and vehicles.[181]

MSAWPA's enforcement mechanisms, however, make it difficult for many farmworkers to be adequately compensated for their injuries in the field. Repeated violations of a single provision of the Act count as only one violation in computing statutory damages, which are capped at the amount of actual damages or $500 per plaintiff per violation.[182] Additionally, certified class actions are capped at the lesser of $500 per plaintiff per violation or $500,000 in total.[183] Further frustrating these important class action claims, federally funded legal services providers serving indigent clients have since been prohibited by federal legislation

176. *See* ROTHENBERG, *supra* note 12 (explaining the circumstances that keep migrant farmworkers in the fields as working poor).

177. *See supra* notes 114–119 and accompanying text.

178. 29 U.S.C. § 1851(a) (2006).

179. *Id.* § 1852(a) ("The Secretary may petition any appropriate district court . . . for temporary or permanent injunctive relief if the Secretary determines that this chapter . . . has been violated.").

180. *Id.* § 1854(a) ("Any person aggrieved . . . may file suit in any district court of the United States . . . without regard to the citizenship of the parties and without regard to exhaustion of any alternative administrative remedies . . . .").

181. *Id.* § 1862(a).

182. *Id.* § 1854(c).

183. *Id.*

from participating in class action lawsuits[184] like those mentioned in MSAWPA. Since many migrant farmworkers live below the poverty line[185] and can only afford pro bono representation, the barriers to free or reduced-fee legal services seriously weaken the utility of MSAWPA.

Class action lawsuits and serious penalties for offenders are vital for effectively safeguarding migrant farmworkers under MSAWPA.[186] Meaningful legislative reform of MSAWPA should raise the $500 cap on private individual remedies in order to adequately compensate wronged employees, enable class action lawsuits to be brought by federally funded legal services providers, and allow each violation to stand as a separate count rather than in the aggregate.[187] These changes would add much-needed teeth to MSAWPA by better enforcing its current provisions and by increasing its available remedies for farmworkers.

Similarly, MSAWPA lacks meaningful inspection requirements that would hold agricultural employers accountable and ensure safe working conditions and fair labor terms for migrant farmworkers.[188] The current inspection systems of the EPA, OSHA, and MSAWPA are negligible,[189] so adding periodic agricultural inspections to MSAWPA, like those described by the ILO,[190] would enable the Secretary of Labor to effectively monitor employers' compliance with MSAWPA's wage and health safeguards. Additionally, MSAWPA should allow government officials, as well as legal and health services providers, access to migrant farmworker camps without invitation in order to create an extra

184. Omnibus Consolidated Rescission and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(7), 110 Stat. 1321, 1353 (prohibiting federal legal service funds from being used to "initiate[] or participate[] in a class action suit"). Additionally, this legislation banned funds to represent undocumented immigrants. *Id.* § 504(a)(11), 110 Stat. at 1354–55. *See also* BRENNAN CTR. FOR JUSTICE, RESTRICTING LEGAL SERVICES: HOW CONGRESS LEFT THE POOR WITH ONLY HALF A LAWYER 2–22 (2000) (comparing the effectiveness of legal services providers before and after this legislation).

185. KANDEL, *supra* note 27, at 27 (illustrating that over twenty-five percent of noncitizen farmworkers live below poverty level and less than ten percent of migrant farmworkers have health insurance).

186. *See* BRENNAN CTR. FOR JUSTICE, *supra* note 184, at 18 (detailing how current restrictions on legal services provided to migrant farmworkers have hindered adequate representation and resulted in the abandoning of many potential lawsuits).

187. *See supra* notes 182–186 and accompanying text.

188. *See* 29 U.S.C. § 1862(a) (2006) (granting only the Secretary of Labor authority to investigate and determine compliance with the Act).

189. *See* discussion *supra* Part III.

190. ILO Labour Inspection Convention, *supra* note 158, 812 U.N.T.S. at 92.

level of accountability for agricultural employers.[191] Adding these dual inspection elements to MSAWPA would encourage employer compliance, establish workplace accountability, and augment enforcement of the existing MSAWPA provisions.[192]

Since both migrant and immigrant agricultural workers are expressly excluded from our nation's statutory protections, they cannot use the adjudication procedures of existing administrative bodies. Any statutory changes in MSAWPA, therefore, must also be accompanied by the creation of an administrative body equipped to adjudicate all claims falling outside of the purview of current laws. This administrative body's jurisdiction would be defined not by the type of claim (wage, freedom of association, safe working environment) but rather by the type of claimant—farmworkers would be precluded from seeking other forms of relief. Such an administrative body, the "Agricultural Worker Protection Agency" (AWPA), would be modeled on the labor courts of Israel and Sweden, which are equipped to adjudicate every aspect of labor and employment law.[193] AWPA would be empowered to adjudicate claims arising under the revised MSAWPA, providing administrative oversight of agricultural employers and remedial recourse for aggrieved workers.[194]

The structure of AWPA would also result in fairer employment conditions for agricultural workers because it would balance the interests of employer and employee. Like the Swedish Labor Court, AWPA should be a tripartite court, with government-appointed judges serving as neutral arbiters and partisan lay members representing both employer and employee interests. These lay members could be voted into office by their constituents (unions and employer groups), or, following Sweden's example, they could be appointed by the government from nomination lists submitted by these respective groups. Not only would such a tripartite system give a greater voice to agricultural workers, it would also provide a venue for compromise and cooperation between agricultural employers and farmworkers. Without the formation of AWPA, the rest of the statutory reforms to MSAWPA will be little more than a "paper victory" for farmworker rights.

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191. *See supra* note 122 and accompanying text.

192. *See supra* notes 182–191 and accompanying text.

193. *See supra* notes 159–171 and accompanying text.

194. Where appropriate, the substantive standards already established in the OSH Act and NLRA could be incorporated into AWPA's mandate. *See supra* notes 85 and 92 and accompanying text.

B. MSAWPA Exemptions

MSAWPA's exemptions are numerous and severely limit its effectiveness in regulating the sphere of farming.[195] These exemptions strike at the very heart of the statute, nullifying its protections for hundreds of thousands of farmworkers, and can only be explained by the large agricultural lobby present at MSAWPA's inception.[196] The most limiting exceptions to this statute include the labor organization exception,[197] as well as the two most invoked[198]: the small farmer[199] and the family business exceptions.[200]

Exempting small farms from MSAWPA's sweeping safeguards has the effect of withholding protection from the most isolated agricultural laborers. The small farm exemption was initially justified by the fragility of such farms[201] and the persistent public nostalgia for a pastoral view of farming.[202] However, small farms still comprise a majority of all agricultural operations in the United States[203] and therefore constitute a significant loophole in the protections of MSAWPA, permitting at least sixty percent of agricultural employers to escape MSAWPA's provisions for hired farmworkers.[204] The burgeoning growth of

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195. *See* Russo, *supra* note 99, at 206.

196. Mary Lee Hall, *Defending the Rights of H-2A Farmworkers*, 27 N.C. J. INT'L L. & COM. REG. 521, 532 (2002) (explaining that the sugar industry lobbied hard for the exemptions for temporary foreign agricultural workers under MSAWPA). The agricultural lobby was also instrumental in weakening the protections afforded by FIFRA, OSH Act, and the WPS. Cunningham-Parmeter, *supra* note 50, at 466–70.

197. 29 U.S.C. § 1803(a)(3) (2006) (exempting labor organizations from the Act's protections).

198. Russo, *supra* note 99, at 219.

199. 29 U.S.C. § 1803(a)(2) (exempting small businesses employing fewer than five hundred "man-days" of agricultural labor).

200. *Id.* § 1803(a)(1) (exempting individuals engaged in farm labor contracting activities on behalf of agricultural operations owned and operated by family members).

201. Beth Lyon, *Farm Workers in Illinois: Law Reforms and Opportunities for the Legal Academy to Assist Some of the State's Most Disadvantaged Workers*, 29 S. ILL. U. L.J. 263, 270 (2005).

202. *See* Sally Schauman, *The Garden and the Red Barn: The Pervasive Pastoral and Its Environmental Consequences*, 56 J. AESTHETICS & ART CRITICISM 181, 183–84 (1998).

203. Small farms can be defined in numerous ways. The U.S. Department of Agriculture has indicated that farms with sales of less than $250,000 comprise 90 percent of all farms. KANDEL, *supra* note 27, at 3. Those with sales of less than $10,000 account for 60 percent of the market. NAT'L AGRIC. STATISTICS SERV., *supra* note 88, at 7 tbl.1.

204. *Id.* While not a perfect estimate, small farms making less than $10,000 annually probably require fewer than five hundred man-days of labor, which would

organic farms, most of which are small-scale agricultural operations, suggests that small farming will remain viable while continuing to be exempted from MSAWPA's regulations.[205] Similar to California's farmworker laws,[206] restructuring MSAWPA so that it applies to all farms, no matter the size, would better protect farmworkers and enhance employers' accountability.

Likewise, the family business exemption also dramatically limits the application of MSAWPA. While the family exemption may have made sense when farmers only staffed their agricultural operations with family members or local hired hands, the modern phenomenon of staffing family farms with migrant farmworkers[207] refutes such an outdated rationale. While these farms may be hesitant to subject family members or local acquaintances to dismal wages or dangerous work environments, this often does not hold true for their treatment of migrant farmworkers.[208] Instead, Congress should amend MSAWPA to excise the family business exemption and establish legal obligations for farmers that reflect this transition from family farming to hired migrant farmworker agriculture.

Moreover, MSAWPA's exemption for labor organizations cripples the advocacy of farmworker organizers like César Chávez and discourages farmworkers from advocating for their own needs. Although farmworkers are expressly excluded from freedom of association protections under the NLRA,[209] even workers informally organized or unionized under a state labor statute[210]

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exempt nearly two-thirds of all farms from MSAWPA's provisions. *See supra* note 199 and accompanying text.

205. Certified organic crop acreage in the United States doubled from 1997 to 2005, and most of these farms are smaller than conventional operations. CATHERINE GREENE ET AL., U.S. DEP'T OF AGRIC., EMERGING ISSUES IN THE U.S. ORGANIC INDUSTRY 4 (2009). Since many of these organic farms are exempted from most farmworker protections, their certified organic produce may be healthier for consumers, but decidedly not "fair trade." *See* Patricia Medige, *The Labyrinth: Pursuing a Human Trafficking Case in Middle America*, 10 J. GENDER RACE & JUST. 269, 276 (2007) (discussing the human trafficking and torture that occurred at a Colorado organic farm that claimed it was a "responsible steward of planet Earth").

206. *See supra* note 140 and accompanying text.

207. *See* Holley, *supra* note 18, at 577–94 (explaining that farmers' practice of using migrant farmworkers to satisfy a high demand for labor is common); *see also* KANDEL, *supra* note 27, at 4 (noting that the average number of family farmworkers per farm declined significantly from 1950 to 2006, while the average number of hired farmworkers and seasonal workers per farm increased).

208. *See* Holley, *supra* note 18, at 577–94.

209. *See supra* note 92 and accompanying text.

210. *E.g.*, Agricultural Labor Relations Act of 1975, CAL. LAB. CODE § 1152 (West 2003).

find themselves without any statutory rights under MSAWPA.[211] Much of the world already allows migrant farmworkers to unionize,[212] and removing this exemption from MSAWPA would allow more states to follow California's lead and give a voice to this community.[213] If MSAWPA enabled labor organizing, then migrant farmworkers would likely have substantial bargaining power to advocate for their own interests, and the enforcement of MSAWPA's provisions might be monitored and compelled by agricultural unions.

C. MSAWPA's Neglect of Working Arrangements

Although the legislative history of MSAWPA suggests that Congress wanted to protect the "most abused of all workers in the United States,"[214] it is unclear whether Congress intended its prohibition against "violat[ing] the terms of any working arrangement"[215] to include health and workplace safety violations. The only mandated safety provisions in MSAWPA deal with the transportation of farmworkers, but these provisions are limited to farm labor contractors and do not reach agricultural employers.[216] As it stands, MSAWPA only provides for enforcement of other safety standards on the farm if the employer or contractor explicitly advertised or promised such safety standards.[217] MSAWPA thereby incentivizes a counter-productive race to the bottom, where agricultural employers are penalized for adopting safety standards and farmers are rewarded for a failure to commit to field safety.

Congress could amend MSAWPA in two different ways in order to better protect workers. First, Congress could require a warranty of safe working arrangements. In U.S. property law, over forty states recognize an implied warranty of habitability.[218]

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211. *See* 29 U.S.C. § 1803(a)(3) (2006).

212. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, art. 26, U.N. Doc. A/RES/45/158 (Dec. 18, 1990) [hereinafter Migrant Convention].

213. *See supra* notes 130–148 and accompanying text.

214. H.R. REP. NO. 97-885, at 2 (1982).

215. This prohibition against violating "working arrangement[s]" exists for both seasonal and migrant farmworkers. 29 U.S.C. §§ 1822(c), 1832(c) (2006).

216. *Id.* § 1841 (regulating vehicle registration, insurance, and standards for safety of farmworkers in transit).

217. *Id.* § 1821(f) ("No farm labor contractor [or] agricultural employer . . . *shall knowingly provide* false or misleading information to any migrant agricultural worker concerning the terms, conditions, or existence of agricultural employment . . . .") (emphasis added).

218. *See* BARLOW BURKE ET AL., FUNDAMENTALS OF PROPERTY LAW, 342–48 (2d

Under this warranty, new houses are required to conform to certain minimum standards of habitability regardless of what the seller or builder states.[219] Likewise, the common law of contracts requires work to be completed "free from material defects and in a skillful manner."[220] Similarly, MSAWPA could be revised to establish an implied term of safe working conditions so that, regardless of what a farmer advertises, certain minimal levels of workplace safety must be satisfied.[221] These minimum default standards for safe working arrangements could be derived from existing state law examples,[222] and should include pesticide application and field reentry standards,[223] pesticide disclosure requirements,[224] safety training,[225] and medical exams for at-risk agricultural workers.[226]

Secondly, MSAWPA's "working arrangement" provision would more effectively protect farmworkers if it were interpreted broadly.[227] MSAWPA's remedial nature counsels a broad reading of its provisions.[228] Although courts have generally issued relief for workers when faced with employer violations of rights expressly granted by MSAWPA,[229] the intent of the Act is to protect this vulnerable class of farmworkers from abnormally dangerous working conditions.[230] If Congress amended

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ed. 2004) (explaining that most states have either judicially or legislatively upheld an implied warranty of habitability).

219. *See, e.g.*, Nichols v. R.R. Beaufort & Assocs., Inc., 727 A.2d 174, 180 ("[H]ome builders and contractors are . . . under a legal duty . . . to construct habitable houses in a workmanlike manner.").

220. Caceci v. Di Canio Constr. Corp., 526 N.E.2d 266, 270 (N.Y. 1988); *see generally* 17A AM. JUR. 2D *Contracts* § 612 (2008) ("[A]s a general rule . . . there is implied in every contract for work or services a duty to perform skillfully, carefully, diligently, and in a workmanlike manner.").

221. Migrant Convention, *supra* note 212, at art. 70 (requiring that farmworkers have safe working conditions in keeping with principles of human dignity).

222. *See supra* Part IV.A.

223. *See* ILO Chemical Convention, *supra* note 155, at 73–74 (requiring agricultural employers to prevent, assess, and monitor farmworkers' exposure to chemicals).

224. *See* ILO Safety Convention, *supra* note 150, at 246 (requiring disclosure of risks resulting from new technologies).

225. *Id.* at 245; *see also* CAL. FOOD & AGRIC. CODE § 12986 (West 2001) (requiring farmworker pesticide training by a certified instructor).

226. CAL. LAB. CODE § 9040 (West 2003) (requiring employer-provided medical exams for farmworkers potentially exposed to carcinogens).

227. Wolfe & Rosenthal, *supra* note 57, at 705–06.

228. *Id.* at 706 ("Congress enacted [MSAWPA] because Congress recognized that additional legislation was necessary to ensure a fair working environment . . . . To read the 'working arrangement' clause [broadly] . . . makes sense.").

229. *Id.* at 709.

230. H.R. REP. NO. 97-885, at 2 (1982).

MSAWPA's working arrangement provision to specifically require a broad application, then it would govern pesticide exposure and workplace safety, not just misleading advertisements.[231]

Conclusion

Since MSAWPA's inception in 1983, little has changed in the realm of farmworker regulations, and farmworkers remain disadvantaged today. For the sake of farmworkers like the Lopez family, agricultural worker protections can lie fallow no longer. The 111th Congress has been preoccupied with national security, healthcare reform, and financial regulations, and thus far has ignored the need to mend the tattered patchwork of farmworker protections. While it would be difficult to pass such reform in the current political climate, meaningful amendment of MSAWPA would greatly improve the finances, health, and bargaining power of the nation's most vulnerable workers, who are employed in the most dangerous occupation and provide our country's most important resource. By modifying MSAWPA to eliminate several large exemptions, to cover workplace safety regulations, and to provide real enforcement mechanisms and remedies, the United States can address the plight of more than two million workers and ensure humane harvests.

231. *See* 29 U.S.C. § 1821(f) (2006).